Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DOROTHY M. MANTLE,

Petitioner,

vs.

JOHN R. MANTLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a bankruptcy Trustee may effect a taking of a non-filing spouse's separate property and make such property part of the filing spouse's estate in bankruptcy.

Whether the federal court must follow the law of the forum when determining the characterization of property.

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PETITION FOR WRIT OF CERTIORARI

Dorothy Mantle respectfully prays that this court allow a writ of certiorari to issue for the purpose of reviewing the opinion of the Ninth Circuit Court of Appeals decision entered in this proceeding on September 4, 1998, and its denial of the Petition for Rehearing filed on and denied on October 1, 1998, on a question of great importance as presented herein.

OPINIONS BELOW

The opinions of the lower courts are:

1.) The opinion of the Ninth Circuit Court of Appeal filed on September 4, 1998.

2.) The opinion of the Bankruptcy Appellate Panel filed May 17, 1996.

3.) The trial court decision filed August 7, 1995.

4.) The Ninth Circuit Court of Appeal denial of Motion for Rehearing filed October 1, 1998.

JURISDICTION

The case was originally brought before the trial court in an adversary action pursuant to 28 U.S.C. 1134 and 28 U.S.C. 157(b)(2)(E), as the complainant sought a turn over of property claimed to be property of the estate under 11 U.S.C. 541(a)(2). The authority of the BAP's jurisdiction is conferred from the judgment of the trial court pursuant to

28 U.S.C. 158(a)(b). The appeal to the Ninth Circuit Court of Appeals is conferred pursuant to 28 U.S.C. 158(d).

STATUTES INVOLVED IN THIS CASE

Fam. C. 2640 states:

Separate property contributions to property acquisition. (a) "Contributions to the acquisition of the property," as used in this section, include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property.

(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the property at the time of the division.

STATEMENT OF THE CASE

In the trial court the parties have stipulated to all of the pertinent facts. (See JPTO Appendix F pages 1 to 8).

At the time of their marriage the wife had separate property which was used to make a downpayment on the acquisition of real property (Appendix A pages 3 and 4, Appendix B page 2, Appendix F page 3). In 1990 the husband, John Mantle, filed for a dissolution of marriage (Appendix F pages 3 to 4). In his Petition to the court he set forth the characterization of various property, including the separate property used by Dorothy Mantle for the downpayment on the real property (Appendix F page 4, Appendix A pages 3 and 4, Appendix B pages 2 and 3). John Mantle requested that the court confirm this separate property to her as part of the dissolution proceeding (Appendix F page 4). During the course of the dissolution the parties listed and sold the real property. (Appendix B page 2, Appendix F page 4). The net proceeds from the sale were ordered into a blocked account by the court pending the trial or resolution of the dissolution (Appendix F page 5). Prior to an agreement or trial the husband, John Mantle, filed for bankruptcy (Appendix A pages 2 and 4, Appendix G page 3). Wife, Dorothy Mantle, did not file or join in the bankruptcy. The trustee in bankruptcy sought to have the proceeds from the real property declared community property and made part of the bankruptcy estate (Appendix A page 4, Appendix B page 3). Dorothy Mantle objected to the action of the trustee and requested the court declare the funds her separate property under California law. The case went to trial before the bankruptcy court on stipulated facts (Appendix F pages 1 to 8). These questions were presented:

1.) Should the bankruptcy follow California Law in deciding the characterization of the property?

2.) Should the court determine the character the property before deciding how it should be distributed?

3.) Once the character of the property is determined, should it be awarded to that party?

The Bankruptcy Appellate Panel recast the question as: "whether under Family Code 2640, the escrowed funds were community property and thus property of the estate under Section 541(a)(2) (Appendix B page 4).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IF LEFT TO STAND CONSTITUTES A TAKING OF SEPARATE PROPERTY FROM A NON-FILING SPOUSE, AND MAKES IT PART OF THE FILING SPOUSES BANKRUPTCY ESTATE.

The law in California is clear as to what constitutes separate property and what is community property (Appendix B pages 4 and 8, Appendix C page 1, Appendix D page 2, Appendix H pages 2 and 3). The parties to the action have stipulated to each and every fact necessary to prove that the property is Dorothy Mantle's separate property (Appendix F pages 2 to 5, Appendix H pages 2 and 3). Based on these facts the law and the courts in California would find the property is the separate property of Dorothy Mantle (Appendix H page 6, Appendix B pages 5 and 7 to 9, Appendix D pages 2 to 4). By its ruling, the Ninth Circuit has: 1.) Failed to follow California law in determining property characterization; 2.) Failed to apply the law of the forum in reaching its

decision as to whether the property is community property or separate property; 3.) Used 11 U.S.C. 541(a)(2) to make a determination of property characterization, despite there being no federal statute setting forth property characterization; 4.) Effected a taking of separate property from a non-filing spouse to be included in the bankruptcy estate of the other spouse.

The background of Fam C. 2640 is important since it overturned many years of statutory and case law which held that separate property used as a downpayment on real property during marriage was presumed to be a gift absent a written document that expressly reserves the property to the contributing party as their separate property (Appendix G pages 15 to 16, Appendix H pages 7 and 8, Appendix A pages 10 to 11, Appendix B pages 7 and 8, Appendix D pages 2 to 4). The legislature overturned statutory and case law (Appendix G pages 5 to 8 and 15 and 16). Instead, in 1984, legislation was enacted as C.C. 4800.2 now Fam C. 2640, which completely changed the state of the law (Appendix B pages 7 to 9, Appendix C page 1, Appendix D pages 2 to 3, Appendix G pages 15 and 16). Under Fam. C. 2640 the legislature declared that money used to acquire real property remains the separate property of the contributing party unless there is a writing which gives up that separate property characterization (Appendix G pages 5 to 8, and 10 to 14, Appendix B page 7).

Dorothy Mantle contends that in making their ruling the Ninth Circuit Court of Appeals has decided characterization of property using 11 U.S.C. 541 language and not looking to the law of California to reach their decision (Appendix A pages 8 and 11). Dorothy Mantle further

contends that the federal courts are required to apply the law of the jurisdiction and if California law was applied to determine the character of the property, that said property would be determined to be her separate property and would not be included as part of the husband's bankruptcy estate (Appendix A pages 6 to 7 and 10 and 11, Appendix B pages 5 to 6 and 7 to 9). The federal court has thus effected a taking of her separate property where no such taking is allowed (Appendix A page 11, Appendix H page 6, Appendix D pages 2 to 3 and 5 to 6). She has further been injured (as will potentially be all others in a similar position), by the loss of separate property to which the bankruptcy trustee has no right, interest or claim (Appendix B page 6). Further, the creditors of the community are not injured, as she remains responsible for the community property debts from which the debtor has been discharged.

This is the first published federal case deciding this particular issue. This matter needs the attention of the U.S. Supreme Court to settle and resolve a question that has been decided by a Federal Court in direct conflict with the holdings of the State Supreme Court (Appendix A pages 10 to 11, Appendix B pages 7 to 9, Appendix D pages 6 to 9, Appendix H pages 6 and 7).

It is the contention of Dorothy Mantle that the federal courts must:

1.) Make the initial analysis and decision as to the character of the property (Appendix A page 6, Appendix B pages 5 and 7, Appendix C page 1, Appendix D page 2, Appendix H pages 2 and 3);

2.) In doing so they must look to the law of the forum to make a determination of a property's character (Appendix A page 6, Appendix B pages 5 and 7, Appendix D pages 11 and 12); and,

3.) Then apply the property as characterized to 11 U.S.C. 541 to determine if it falls within the ambit of property to be included in a bankruptcy estate.

Had the separate property of Dorothy Mantle been invested in stocks, bank accounts, or other separately held accounts there would be no question that the trustee in bankruptcy would have no right to a turn over order. Based on California law, the funds used for the acquisition of real property are and remain separate property are treated in the same manner (Appendix G pages 4 to 8 and 13 and 14, Appendix B pages 8 and 9, Appendix D pages 5 to 11).

The Ninth Circuit based its decision on the family law court having not yet ruled on the characterization of the property. This reasoning is faulty for three reasons:

1.) Property does not exist in a vacuum where it has no character until a court rules (Appendix A pages 8 to 11); John Mantle asked the state court to "confirm" Dorothy Mantle's separate property to her in his dissolution petition (Appendix F page 4). Neither he nor his counsel ever disputed that under California law her separate property contribution remained her separate property. There was never an issue before the state court about the characterization of the property. The issue was only raised by the bankruptcy trustee who has

asserted rights to a non-filing spouse's separate property; and

2.) The court used a "general statute" in place of a "specific" statute in determining the character of the property (Appendix A page 6); and,

3.) The court failed to appreciate that the California Legislature by enacting Fam. C. 2640 created a specific statute that acted to protect and retain a contributing parties separate property from becoming community property absent a signed writing that gives up and waives the separate property character of the property (Appendix B pages 7 to 9).

The enactment of Fam. C. 2640 was designed to overturn the decision in *In re Marriage of Lucas,* 27 Cal. 3d 808, 166 Cal. Rptr. 853 (1980) (Appendix G pages 15 to 16, Appendix A page 10, Appendix B page 7, Appendix D page 2 to 3, Appendix G pages 15 and 16), which had held that separate property used for the acquisition of real property became a gift to the community absent a writing that the separate property was to retain its character. By enacting 2640 the legislature made it the law in California that absent a writing that waived the separate property characterization the funds would retain their separate property character (Appendix A pages 7 and 11, Appendix B page 7, Appendix D pages 7, 8 and 12, Appendix F page 4, Appendix G pages 4, 5 to 7, 13 and 14).

Without a written waiver the property never changes character. The property was separate property (Appendix H pages 2 and 3, Appendix A pages 3 and 4). The mere use of those funds to acquire real property does not

change the character of those funds and upon dissolution the funds are mandated to be confirmed to the contributing party as their separate property (Appendix A page 7, Appendix B page 8).

As can be seen from the JPTO all of the requirements under Fam. C. 2640 have been stipulated to by the petitioner and respondent (Appendix F pages 2 to 5, Appendix H pages 2 and 3).

If the court is mandated to apply California law in determining the character of property, there is no question the result would be a finding that the funds are her separate property. Judge Russell in the trial court stated so (Appendix H at pages 6 and 7).

The B.A.P. recognized the right of petitioner to the funds (Appendix B at pages 5 and 8 to 9, Appendix C page 1).

ASSERTION OF ERROR BY PETITIONER

The petitioner asserts that the Ninth Circuit made an incorrect determination because they failed to follow California law in reaching their decision; misinterpreting the *Fabian* case and attempting to apply a case that is not factually similar to this case.

The judges of the Ninth circuit readily acknowledge that the threshold question of the debtor's interest in a given asset is not addressed in 11 U.S.C. 541(a)(2); but determined by the court looking to state property law (Appendix A page 6). They go on to acknowledge that property which is separate at the time of marriage retains

its separate character, even if transmuted from one form to another (Citing *Hicks*) (Appendix A page 7).

Petitioner asserts that the judges failed to follow California law and California Supreme Court cases that interpret that law when they held that: "For purposes of 541(a)(2), all community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate" (Appendix A page 8). They cite *Miller v. Walpin (In re Miller)*, 167 B.R. 202 (Bankr. C.D. Cal. 1994), which is not on point with the facts of this case. In *Miller*, the *only* property which the court was looking to divide was community property. There were no 2640 issues, nor was there any separate property to confirm. There was only community property being divided. Such is not the case here. The property in the blocked account is the separate property of the petitioner, Dorothy Mantle. The separate property originally used to acquire the real property did not become transmuted but at all times remained separate property. The 2640 statute specifically holds that *absent* a written waiver the property retains its separate property character. It is not community property that changes form, it is separate property that the court confirms to the owner.

The next error is the refusal to follow the *In re Marriage of Fabian*, 41 Cal. 3d 440, 224 Cal. Rptr. 333, 715 P.2d 253 (1986), and *In re Marriage of Witt*, 197 Cal.App.3d 103, 242 Cal. Rptr. 646 (1987), cases as decided by the California Superior Court.

FAILURE TO FOLLOW CALIFORNIA LAW CREATES TWO RULES FOR SEPARATE PROPERTY REIMBURSEMENT ONE WHO RETAINS RIGHTS AND ONE THAT LOSES VESTED RIGHTS

Fabian dealt with the predecessor to 2640 (C.C. 4800.2). In the *Fabian* case, the husband used separate property to make an acquisition of real property that was held as community property. The use of the separate property money was pre-1984. In 1984, the statute was changed and the *Lucas* presumption of making a "gift" to the community was overturned. *Fabian* held that pre-1984 the use of separate property to acquire property that was held in community property title was deemed a gift to the community. In *Fabian*, the California Supreme Court held that at the time he contributed his separate property to acquire the property, he not only made a gift but the spouse received a vested property right in those funds. The court was very clear when it stated that had C.C. 4800.2 been applicable [that is, had the separate property been contributed post January 1, 1984] that the husband would be entitled to reimbursement. The Ninth Circuit acknowledged this at Appendix A page 10. The court quoted *Witt* saying: "when a spouse has given separate property to the marital community, section [2640] preserves to the contributing spouse the equity value of his or her separate property contribution unless the retained interest is waived . . . " (Appendix A page 10). The court follows that statement from *Witt* with the acknowledgment: "There is no contention that Dorothy ever waived her rights under 2640, nor is there a contention that Dorothy has not been able to trace her contribution to a separate property source" (Appendix A page 10).

The fundamental misapplication of California law by the Ninth Circuit creates two classes of persons. One who is entitled under 2640 to their separate property and a second who is not entitled to their separate property.

This lack of uniform treatment creates a taking of a vested property right from petitioner and awards the other party a windfall by reason of having filed a bankruptcy petition (Appendix B page 6).

In *Fabian* the wife could not be divested of her vested property right. At the time the husband used his separate property it was the law in California that a gift was made absent a writing that preserved the property as separate. The right vested immediately.

However, after January 1, 1984, the exact opposite was the case. The community did not receive any interest in the separate property of the contributing spouse. That person retained the property as their separate property. John Mantle never received any right or interest to petitioner Dorothy Mantle's separate property.

By attempting to use the *Miller v. Walpin* language to determine the outcome of the case, the judges have failed to follow the rule of law as set down by the legislature and interpreted by the California Supreme Court. The property was separate property and remained separate property. It never was community property. The property is not community property waiting to be transmuted into separate property. The husband did not acquire any rights to Dorothy's separate property. As set forth in the statute, she preserved her funds as her separate property by not making a waiver. The Bankruptcy Appellate Panel specifically noted and acknowledged this rule (Appendix

B pages 7 to 8). In fact they stated that: "whether a reimbursement order . . . was issued prior to the time John Mantle's bankruptcy was filed is not dispositive as to the nature of Dorothy Mantle's interest in the proceeds . . . " (Appendix B page 9).

CONCLUSION

If the federal courts are obligated to apply the law of the forum in the rendering of their determination of the characterization of property and if the property is found to be separate property, then an inclusion of that property in the bankruptcy estate of the husband constitutes a taking of a vested property right over which the husband (and by extension) the court trustee has no right to include in the bankruptcy estate under 11 U.S.C. 541(a)(2).

It is clear that Judge Russell at the trial court recognized that if California law were applied, or if any California Judge were ruling on the matter that it would be "unquestionably" the separate property of Dorothy Mantle.

The Bankruptcy Appellate Panel found that it is the separate property of Dorothy Mantle.

The Ninth Circuit opinion is inconsistent with all California rulings, cases and the statutory scheme that was enacted to specifically retain the separate property character of separate funds used to make a down payment on property.

If this ruling were to be allowed to stand, there would be two different rules regarding separate property and how it is distributed in a dissolution proceeding. In a state court, the property would be confirmed as separate property while in the bankruptcy court the same property would be included in the other spouse's estate as community property.

In order that all courts follow the rule of law, this court needs to intervene and to rule that the forum jurisdiction laws are to be used as the deciding factor in determining the character of the property and to prevent a vested property right from being transgressed by the bankruptcy court.

For the reasons set forth in this brief and in the attached Appendix, the petitioner would respectfully pray that this court accept this Petition for Certiorari and review the matter on the merits.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JOHN R. MANTLE, *Debtor.*	No. 96-55833
JAMES A. DUMAS, JR., Chapter 7 Trustee, *Appellant,* v. DOROTHY M. MANTLE, *Appellee.*	BAP No. CC-95-01868-VMeO LA94-04264-BR OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Volinn, Meyers, Ollason, Judges, Presiding

Argued and Submitted
November 4, 1997 – Pasadena, California

Filed September 4, 1998

Before: James R. Browning, Melvin Brunetti, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Brunetti

COUNSEL

Richard Malatt, Dumas & Associates, Los Angeles, California, for the appellant.

John A. Tkach, McMillan & Tkach, Pasadena, California, for the appellee.

OPINION

BRUNETTI, Circuit Judge.

INTRODUCTION

Dorothy and John Mantle were married in June of 1985. John filed a petition for dissolution of marriage in October of 1990, and a petition for bankruptcy in July of 1993, before the marriage was dissolved. After John filed for divorce, but before he filed for bankruptcy, the couple sold their community property house. The bankruptcy court determined that the proceeds from the sale of the house were community property and property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(2).[1]

The Bankruptcy Appellate Panel ("BAP") reversed and remanded, holding that since Dorothy was entitled to reimbursement for her separate property contribution to the downpayment on the community property house under Cal. Fam. Code § 2640,[2] it was not proper to characterize the entire proceeds from the sale of the house as community property. According to the BAP, the community property which was property of the bankruptcy estate pursuant to § 541(a)(2) included the proceeds from the sale of the community property house, minus the amount owed Dorothy as reimbursement of her separate property.

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[1] All citations hereinafter to "§ 541(a)(2)" refer to that section of the Bankruptcy Code, Title 11 of the United States Code.

[2] All citations hereinafter to "§ 2640" refer to that section of the California Family Code.

The trustee of the bankruptcy estate now appeals. The sole issue on appeal is whether the escrowed proceeds from the sale of the Mantles' community property house were community property, and therefore property of the bankruptcy estate pursuant to § 541(a)(2). We find that the proceeds were community property, and therefore reverse the BAP.

FACTS

Before marrying John Mantle ("John"), Dorothy Mantle ("Dorothy") owned certain real property in San Fernando, California ("the San Fernando property"). Also before marriage, Dorothy and John filed a joint application for a loan to purchase a house in Canoga Park, California ("the Canoga Park property").

Dorothy and John were married in June 1985. In August 1985, Dorothy sold the San Fernando property, for which she received $79,373.76. Dorothy placed these funds into an individual checking account.

On September 13, 1985, a deed was recorded transferring the Canoga Park property to John and Dorothy Mantle, "husband and wife as joint tenants." The purchase price of $238,900 was paid with a downpayment of $62,306 from Dorothy's separate bank account and a promissory note in the amount of $175,000 executed jointly and severally by John and Dorothy, and secured by a first deed of trust in the subject property. During the time of their marriage until their separation in June 1990, community property funds from the spouses' respective earnings were used to make payments on the promissory note.

There were no written agreements between John and Dorothy "altering, modifying or changing the manner in which title to the [Canoga Park] property is held." Nor, as the parties stipulated, were there any written agreements waiving any right to reimbursement Dorothy might have had for her contribution to the purchase of the house.

On October 10, 1990, John filed a petition for dissolution of the marriage. In December 1991, the Canoga Park property was sold and the balance of all the proceeds after payment of debt and costs, $67,295.12, was placed in an escrow account pending further order of the California Superior Court adjudicating the Mantles' divorce.

On July 6, 1993, John filed a Chapter 7 bankruptcy petition. At the time of the bankruptcy filing, the court handling the Mantles' divorce had not entered any order or judgment dividing the couple's property, including the escrowed $67,295.12. In November 1994, the bankruptcy trustee initiated an adversary action seeking a declaration that the escrowed proceeds from the sale of the Canoga Park property were property of the bankruptcy estate pursuant to § 541(a)(2).

The bankruptcy court entered judgment in favor of the bankruptcy trustee, finding that the house was community property, and that the sale of the house did not change the community character of the property. The BAP also found that the house was community property; neither party contests that finding on appeal. Because no order affecting the nature of the property had been entered by the California Superior Court prior to John's filing of the bankruptcy petition, the bankruptcy court held that the escrowed funds generated by the sale of the

house were community property, which became property of the bankruptcy estate at the time of John's bankruptcy filing.

The BAP reversed. Citing § 2640, the BAP found that Dorothy retained a "continuing and supervening" separate property interest to the extent of her separate contribution to the purchase of the community property house. Noting that the § 2640 right to reimbursement is absolute absent evidence of a written waiver of the right, the BAP held that Dorothy's separate interest in the escrowed funds was not properly classified as property of the bankruptcy estate under § 541(a)(2). Accordingly, the BAP remanded to the bankruptcy court for determination of the amount of the escrowed funds owed Dorothy pursuant to § 2640, and for entry of an order distributing to Dorothy that amount.

DISCUSSION

I.

Decisions of the BAP are reviewed de novo. *Key Bar Invs., Inc. v. Fischer (In re Fischer)*, 116 F.3d 388, 390 (9th Cir. 1997); *Steelcase, Inc. v. Johnston (In re Johnston)*, 21 F.3d 323, 326 (9th Cir. 1994). This court independently reviews the bankruptcy court's rulings on appeal from the BAP. *Quarre v. Saylor (In re Saylor)*, 108 F.3d 219, 220 (9th Cir. 1997). The bankruptcy court's conclusions of law are reviewed de novo, and its factual findings are reviewed for clear error. *Dominguez v. Miller (In re Dominguez)*, 51 F.3d 1502, 1506 (9th Cir. 1995).

II.

Under the Bankruptcy Code, property of the bankruptcy estate includes:

> All interests of the debtor and the debtor's spouse in community property *as of the commencement of the [bankruptcy] case* that is –
>
> (A) under the sole, equal, or joint management and control of the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

11 U.S.C. § 541(a)(2) (emphasis added). While this provision defines what interests of the debtor must be transferred to the bankruptcy estate, it does not address "the threshold questions of the existence and scope of the debtor's interest in a given asset." *State of California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.)*, 792 F.2d 1400, 1402 (9th Cir. 1986). Rather, bankruptcy courts are required to look to state property law, in this case California property law, to determine the property which is to be included in the bankruptcy estate. *See Butner v. United States*, 440 U.S. 48, 55 (1979).

Turning to California law, it is clear that property acquired in joint form during marriage is presumed to be community property. *See* Cal. Fam. Code §§ 760, 2581.[3]

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[3] Cal. Fam. Code § 760 provides:

> Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a

On the other hand, property that is separate at the time of marriage retains its separate character throughout the marriage, even if it is transmuted from one form to another. *See Hicks v. Hicks*, 211 Cal.App.2d 144, 151 (1962).

In the present case, there is no dispute as to the community property nature of the Canoga Park property prior to its sale. Where the disagreement arises is with respect to the characterization of the proceeds received from the sale of the property. John claims that the proceeds retained their community property nature. Dorothy, however, argues that her right to reimbursement under § 2640[4] vested in her a separate property interest in the

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married person during the marriage while domiciled in this state is community property.

Cal. Fam. Code § 2581 provides:

For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property.

[4] Section 2640 provides, in pertinent part:

(a) "Contributions to the acquisition of the property," as used in this section, include downpayments, payments for improvements, and

sale proceeds to the extent of her separate property contribution to the purchase of the community property house.

III.

For purposes of § 541(a)(2), all community property not yet divided by a state court at the time of the bankruptcy filing is property of the bankruptcy estate. In *Miller v. Walpin (In re Miller)*, 167 B.R. 202 (Bankr. C.D. Cal. 1994), the California Superior Court had dissolved the marriage, but retained jurisdiction to divide the community property. Before such division occurred, the wife filed for bankruptcy. "Under California law, the event which terminates liability of community property for community debts as well as debts of the other spouse is division of the community property, not dissolution of the status of the marriage." *Id.* at 208. Thus, the bankruptcy court held that all community property of the divorcing couple was property of the bankruptcy estate where division of the community property had not occurred as of the date the bankruptcy was filed.

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payments that reduce the principal of a loan used to finance the purchase or improvement of the property. . . .

(b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source.

We agree that under California law, division of property is the event that will sever the liability of community property for community debts, and, until division, all community property of the divorcing couple is property of the bankruptcy estate pursuant to § 541(a)(2). Because, in the present case, there is no evidence that the superior court adjudicating the Mantles' divorce had entered any order dividing their property, the proceeds from the sale of the community property house remained community property, and therefore should have been considered property of the bankruptcy estate. The present case can thus be distinguished from *Keller v. Keller (In re Keller)*, 185 B.R. 796 (B.A.P. 9th Cir. 1995), wherein the bankruptcy petition was filed *after* a final divorce judgment had been entered by the Superior Court for Orange County, California.

IV.

In reaching the above conclusion, we reject the BAP's interpretation of § 2640 as creating a continuing and supervening separate property interest, beyond the community interest, to the extent of the separate funds invested in the community property.

The California Supreme Court addressed the scope of the § 2640 right to reimbursement in *Fabian v. Fabian (In re Marriage of Fabian)*, 41 Cal.3d 440 (1986). There, the husband had used $275,000 of his separate property to purchase a hotel shortly after he was married. Title was taken in the form of community property. The court held that the hotel was community property, and the husband was not entitled to reimbursement. The court stated,

however, that had Cal. Civ. Code § 4800.2 [the predecessor statute to § 2640] been applicable, the husband would have been entitled to reimbursement for his separate property contributions to the community property assets upon dissolution. *Fabian*, 41 Cal.3d at 447-48. "Under the new law [section 4800.2] no agreement is needed: the tables are turned so that the separate property interest is now *preserved* unless the right to reimbursement is waived in writing." *Id.* at 450 (emphasis added); *see also Witt v. Witt (In re Marriage of Witt)*, 197 Cal.App.3d 103, 105 (1988) (holding that "when a spouse has given separate property to the marital community, section [2640] preserves to the contributing spouse the equity value of his or her separate property contribution unless that retained interest is waived. . . . "). There is no contention that Dorothy ever waived her rights under § 2640, nor is there a contention that Dorothy has not been able to trace her contribution to a separate property source.

Here, the BAP seized upon the "preserved interest" language in the above-cited cases in holding that Dorothy's § 2640 right to reimbursement had vested into a separate property interest prior to final adjudication by the superior court. The BAP based its holding in part upon the finding that the house was sold pursuant to a court order. We find no evidence in the record that the superior court had ordered the sale of the house, although a court order was granted preventing either party from accessing the proceeds from the sale. The failure to find such evidence is immaterial, however, to our decision.

While we acknowledge that cases such as *Fabian* and *Witt* interpret § 2640 as creating a substantive property right, namely, the right to reimbursement, no California case holds that the operation of § 2640 may result in the transmutation of community property into separate property prior to division by the state court. Further, California law clearly does not allow one to claim that community property is separate property simply because one can trace its source to separate property. *See* Hogoboom and King, *Cal. Practice Guide: Family Law*, 8:427 at 8-105 (1995).

V.

The Mantles' Canoga Park property was community property. When the property was sold, the proceeds from the sale remained community property. Because the superior court had not yet divided the property at the commencement of the bankruptcy proceedings, the escrowed community property funds became property of the bankruptcy estate. Although Dorothy retains her § 2640 right to reimbursement for her separate property contribution to the community property, this separate property interest does not render the sale proceeds her separate property prior to division by the superior court. Therefore, the bankruptcy court was correct in holding that the proceeds must be classified as property of the bankruptcy estate pursuant to § 541(a)(2).

The BAP opinion is REVERSED.

REVERSED.

APPENDIX B

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re JOHN MANTLE, Debtor.	)	BAP No. CC-95-1868-VMeO BK. No. LA93-33940 BR
DOROTHY M. MANTLE, Appellant, v. JAMES A. DUMAS, JR., Chapter 7 Trustee, Appellee.	)	Adv. No. LA94-04264 BR **OPINION**

Argued and Submitted on February 21, 1996
at Pasadena, CA

Filed – MAY 17 1996

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

Before: VOLINN, MEYERS, and OLLASON, Bankruptcy Judges.

VOLINN, Bankruptcy Judge:

FACTUAL BACKGROUND AND PROCEEDINGS

The debtor, John Mantle, and the appellant, Dorothy Mantle, were married in June, 1985. Before her marriage to Mr. Mantle, Ms. Mantle owned certain real property located in San Fernando, California. In August, 1985, Ms. Mantle sold the property and received $79,373.76 in net proceeds, which she placed in an individual checking account.

During the same year, the Mantles contracted to purchase a home for $238,900. Ms. Mantle made a downpayment of $65,306 (including $3,000 in closing costs) from the checking account. The Mantles jointly executed a promissory note, secured by a deed of trust on the property, for the outstanding balance of $175,000. The sale closed on or about September 13, 1985. Title to the property was held in the names of John Mantle and Dorothy M. Mantle, husband and wife, as joint tenants. Payment on the note was made from community funds. The record indicates that Ms. Mantle also spent $3,824 from the above-mentioned individual checking account to purchase a house alarm system.

The Mantles separated in June, 1990. The debtor initiated divorce proceedings by filing a Petition for Dissolution of marriage on or about October 10, 1990 (the "Petition"). In the Petition, Mr. Mantle requested, *inter alia*, that the downpayment on the community residence be confirmed as Ms. Mantle's separate property. Neither party had executed a writing authorizing that the downpayment from her separate funds be treated otherwise.

The Mantles sold the house in December, 1991, in the course of the divorce proceedings pursuant to court

order. After payment of the amount owing on the note and closing costs, the balance of $67,295.12 was placed into escrow pending further order of the court. On July 6, 1993, before the California superior court could enter an order designating the Mantles' respective assets and liabilities, Mr. Mantle filed a bankruptcy petition under Chapter 7.

In November, 1994, the bankruptcy trustee initiated an adversary proceeding against the escrow company and Ms. Mantle seeking a declaration that the funds held in escrow were estate property and asking that they be turned over to the trustee. In her response, Ms. Mantle requested that the bankruptcy court declare the funds her separate property and transfer them to her.

Upon stipulated facts, the court held that since the escrowed funds were proceeds from the sale of community property, they remained community property. The court ruled that while state law provided that the proceeds could be confirmed to Ms. Mantle as her separate property pursuant to California Family Code section 2640,[1] (hereinafter Fam.Code § 2640) because the state

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[1] Section 2640 provides, in pertinent part: "in the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. . . . As used in this section, 'contributions to the acquisition of the property' include downpayments, payments for improvements, and payments that reduce the principal of a loan." Cal. Fam. Code § 2640 (West 1994).

court had not entered the reimbursement order at the time bankruptcy was filed, the funds had not lost their character as community property and thus were an asset of the estate pursuant to 11 U.S.C. § 541(a)(2).[2] Ms. Mantle timely appealed the trial court's judgment.

ISSUE

The narrow issue tendered to the court below and on appeal is whether under Fam.Code § 2640, the escrowed funds were community property and thus property of the estate under Section 541(a)(2).

STANDARD OF REVIEW

"The nature of a debtor's interest in property, although largely a question of fact, is based on the interpretation of legal principles." *In re Keller*, 185 B.R. 796, 798 (9th Cir. BAP 1995). "Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying

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[2] Unless otherwise stated, all references to "sections", "§ " and "rules" refer to the U.S. Bankruptcy Code, 11 U.S.C. § 101 et seq.

Section 541(a)(2) provides, in pertinent part: "[An] estate is comprised of all of the following property, wherever located and by whomever held:. . . . All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is – (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

legal principles are reviewable de novo." *Mayors v. C.I.R.*, 785 F.2d 757, 759 (9th Cir. 1986). As the parties stipulated to the facts, they need not be reviewed on appeal.

DISCUSSION

Community property jurisdiction under the Bankruptcy Code

In a non-dissolving marriage, community property is property of the estate. *In re Teel*, 34 B.R. 762, 764 (9th Cir. BAP 1983); §§ 541(a)(2)(A) and (B). When a bankruptcy petition is filed prior to the final disposition of property between divorcing spouses, the community property generally comes within the jurisdiction of the bankruptcy court to assure fairness to the creditors of the individual spouses and the marital estate. *In re Keller*, 185 B.R. at 799. However, only community property that is under the debtor's control or is "liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable" falls within the definition of property of the estate. § 541(a)(2)(B).

Section 541(a), however, "merely defines what interests of the debtor are transferred to the estate. It does not address the threshold question of the debtor's interest in a given asset." This question is resolved "by reference to nonbankruptcy law." *In re Farmer's Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986). "Property interests are created and defined by state law." The bankruptcy court must apply the law of the state where the court is located.

Butner v. United States, 440 U.S. 48, 55 (1979). As the Supreme Court explained,

> [u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

Id. at 55 (quoting *Lewis v. Manufacturers National Bank*, 364 U.S. 603, 609 (1961)).

In analyzing whether, pursuant to Section 541(a)(2), the escrowed funds were an asset of the estate, the trial court concluded that because the state court had not issued the reimbursement order at the time Mr. Mantle filed bankruptcy, the funds were community property and, therefore, property of the estate. The appellant contends that, nevertheless, under Fam.Code § 2640, Ms. Mantle's downpayment remained separate property throughout the couple's ownership of the house.

Under California law, prior to sale of the house, the Mantle's residence would have been properly characterized as community property.[3] *See* William P. Hogoboom and Donald B. King, *Cal. Practice Guide: Family Law* 8-427 (1995) (stating that a spouse's ability to trace the monies used to purchase community property "is insufficient to establish a separate property interest" in community property). However, under Fam.Code § 2640, a spouse who

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[3] The bankruptcy court found that Ms. Mantle had admitted that the residence was community property and that she was estopped from denying it.

makes a downpayment with separate funds retains a continuing and supervening property interest beyond the community interest to the extent of the separate funds invested in the property. Once the Mantles' residence was sold at the direction of a court with jurisdiction over the divorcing couple and the funds placed in escrow pending final entry of the divorce decree, Ms. Mantle had a vested interest in the proceeds of the sale to the extent of her separate contribution so long as she had not actively divested herself of the right to claim the separate property interest.

Underlying the California statute is a modification of the community property presumption: the separate property interest is preserved even where a spouse uses it to purchase a community asset. *See* California Family Code § 752. The California Supreme Court described the effect of Fam.Code § 2640 as a "180-degree departure from former law" and explained: "the tables are turned so that the separate property interest [of a spouse] *is now preserved* unless the right to reimbursement is waived in writing." *In re Marriage of Fabian*, 715 P.2d 253, 259 (1986) (emphasis supplied). The court went on to say that, in the absence of a writing, "the funds must be characterized as separate property." *Id. See also In re Marriage of Witt*, 197 Cal.App.3d 103, 107 (1987) (stating that Fam.Code § 2640 "presently creates a substantive right of reimbursement"); *In re Marriage of Perkal*, 203 Cal.App.3d 1198, 1202 (1988) (stating that "Husband has a 'property right' to seek reimbursement from Wife"); *Hogoboom and King, supra*, at 8-443 (stating that the *Fabian* court found that Fam.Code § 2640 created a new property right in the

contributing spouse – i.e., a "property right of reimbursement"). In addition, the *Witt* court specifically rejected the argument that the statute "only becomes applicable when a trial court divides property, not when the property is initially transferred to the marital community." *Witt*, 197 Cal.App.3d at 107. Thus, while the statute is couched in terms of reimbursement, the right to reimbursement is rooted in the contributing spouse's prior separate property interest.

The state law governing distribution of property between divorcing spouses provides that traceable separate property, whether or not it is contributed to a community asset, retains its separate character and must be reimbursed to the contributing spouse. A court has no discretion to direct otherwise. *See Hogoboom and King, supra*, at 8-442 (stating that "the right to reimbursement is absolute" if Fam.Code § 2640 applies unless a party has made a written waiver of the right). *See also Fabian*, 715 P.2d at 259 (stating that in the absence of a written waiver of the right to reimbursement the funds must be characterized as separate property); *In re Chenich*, 87 B.R. 101, 104 (9th Cir. BAP 1988) (stating that "[t]he [divorce] court is given no discretion to adjust the division of assets to reflect equitable considerations unless the parties have a written agreement" (citing Legislative Committee Comment to Cal.Civ.Code Section 4800, later recodified as Fam.Code § 2640)), *app. dism.*, 883 F.2d 1023 (9th Cir. 1989). It is clear therefore that under Fam.Code § 2640, upon the sale of a house in a divorce proceeding where the facts are not in dispute, a trial court judge would be required to order the reimbursement of all of a spouse's separate property contributions to the purchase of the

community property. In such a case, an order of reimbursement is, for all practical purposes, a ministerial act.

Therefore, whether a reimbursement order declaratory of the Ms. Mantle's separate interest under Fam.Code § 2640 was issued prior to the time Mr. Mantle's bankruptcy was filed is not dispositive as to the nature of Ms. Mantle's interest in the proceeds from the pre-bankruptcy sale of the property.

Where a divorcing couple has, pursuant to court order, sold their residence and placed the proceeds in escrow pending the final order of the state court, the contributing spouse's separate interest in the escrowed funds subsists prior to the entry of judgment by the state court. Therefore, the escrowed funds in this case did not fall within the definition of property of the estate contained in Section 541(a)(2).

CONCLUSION

Ms. Mantle's separate interest in the escrowed funds was prescribed and identified under California law. State law is determinative and warrants her recovery of the funds. The trustee has no right to possession of the escrowed funds. We reverse and remand to allow the trial court to determine what portion of the escrowed funds were contributions within the meaning of Fam.Code § 2640 and for entry of an order distributing to Ms. Mantle the contributions she made from her separate individual checking account or such other funds to which she would be entitled pursuant to Fam.Code § 2640.

APPENDIX C
UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re JOHN MANTLE, Debtor.	BAP No. CC-95-1868-VMeO Bankruptcy No. LA93-33940-BR
DOROTHY M. MANTLE, Appellant, v. JAMES A. DUMAS, JR., Chapter 7 Trustee, Appellee.	Adversary No. LA94-04264-BR Clerk's Notice To Parties (Filed May 24, 1996)

There is a technical change to the panel's opinion filed on May 17, 1996. On page 5, line 24, the sentence is corrected to read: "The bankruptcy court must apply state law." This correction changes the pagination on both pages 5 and 6. Attached for the parties reference are revised pages 5 and 6.

FOR THE PANEL
Nancy B. Dickerson, Clerk

/s/ Cynthia E. Ashton
BY: Cynthia Ashton
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: JOHN R. MANTLE, Debtor.	)	No. 96-55833
JAMES A. DUMAS, JR., Chapter 7 Trustee, Appellant, vs. DOROTHY M. MANTLE, Appellee.	)	BAP# CC-95-1868VMeO

Petition for Rehearing from the
United States Court of Appeals
for the Ninth Circuit

APPELLEE'S PETITION FOR REHEARING FRAP 40

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ATTORNEYS FOR
Appellee Dorothy Mantle

The petitioner hereby respectfully requests a rehearing of the case based on the following points of law and fact which in the opinion of petitioner the court has overlooked or misapprehended:

The mandate to follow the law of the forum in application and interpretation of statute.

The use of a general rather than a specific statute as controlling.

The retention of the separate property character of the property.

The taking of a vested property right.

INTRODUCTION

Characterizing the status of property interests as "community" or "separate" property is the foundational starting point for the resolution of marital property rights. "Characterization must take place in order to determine the right and liabilities of the parties. [Marriage of Haines (1995) 33 Cal. App. 4th 277, 291].

The facts are undisputed. The funds in question were the separate property of Dorothy Mantle. This is admitted by the debtor in his dissolution Petition and stipulated in the JPTO filed with the trial court. This court misapprehended California law when it looked to a general statute rather than using a specific statute to make a finding concerning the properties character. The question which must be decided is whether it is this courts responsibility to make a finding using the laws of the state of California, in coming to a decision as to the character of the property.

On April 6, 1998, in the case of *In re Marriage of Walrath* (1998) 17 Cal. 4th 907, the Supreme Court of California held that a spouse's right to reimbursement for separate property contributions to the acquisition of an

asset not only attach to that specific asset but also to any other asset that is subsequently acquired from the proceeds of the first, so long as the separate property contribution can be traced. The court concluded that the Legislature did *not* intend for a spouse who made substantial separate property contributions to a community asset to lose the right to reimbursement simply because the community asset was refinanced and the proceeds were used to acquire additional assets. The court in its opinion specifically found that Fam. C. 2640 *overturned* a long line of cases that held that separate property contributions to community property were deemed to be community property [citing *Fabian*[1]]. The court went on to point out that a contributing spouse *has a vested property right in his or her right to reimbursement*. The court went on to say that this **vested right** was *just as* viable as a non-contributing spouse's right to separate property contributions had been where they were deemed gifts to the community under *Lucas*. [citing *Witt*[2]]. After this case was submitted the decision the California Supreme Court enunciated the fact that a **vested property right does exist** in the separate property right to reimbursement. Because it is a vested right that exists there is no transmutation from separate to community. Instead the separate property character is at all times existing and present. The court also went on to observe that important social policy protections were involved which support this interpretation of Fam. C. 2640. This interpretation

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[1] In re Marriage of Fabian (1986) 41 Cal. 3d 440

[2] In re Marriage of Witt (1987) 197 Cal. App. 3d 103

allows parties "to freely and without reservation contribute their separate property assets to benefit the community". The court also found that this interpretation protects the general expectations of most persons in a marriage that they will be reimbursed for significant monetary contributions if the community dissolves. Certainly in this case that is the result. Dorothy Mantle contributed all of her separate property to the downpayment of the residence. When the parties decided to dissolve their marriage it was ***both*** parties intention that she would receive her separate property back. In the pleading filed by Mr. Mantle he specifically requested the court to "confirm" to Dorothy her separate property. This pleading admission was done based on the law and the expectations of the parties. As the court noted the expectations of the parties based on California law and the social policy considerations are in addition to the fact that the party has a vested property right that cannot be taken by a mere change of form of the property. The form of the property cannot alter the rights of the contributing party and the properties character does not change. The fact that a spouse files bankruptcy cannot alter the character of the property. The property retains its separate property character. The right to reimbursement is assured because it has remained separate even though used to acquire a community asset.

The general Section 760 community property presumption may be rebutted by tracing a marital acquisition to a separate property source. [Marriage of Haines (1995) 33 Cal. App. 4th 277, 290; Marriage of Dekker (1993) 17 Cal. App. 4th 842, 848].

The legislative mandate that requires the court to order reimbursement of these funds was done to specifically overturn the prior presumption that funds contributed became community absent a signed writing that specifically reserved their character as separate.

"California Family Section 760 defines "community property" as all property acquired during marriage . . . this principle has always been treated as a "general" community property "Presumption" [Marriage of Leversee (1984) 156 Cal. App. 3d 891, 895-896; See v. See (1966) 64 Cal. 2d 778; Marriage of Haines (1995) 33 Cal. App. 4th 277, 289-290]

By shifting the law 180 degrees from what it had been the legislature made a decision that the property retains its separate property character absent a signed writing that transmutes the property to another form. This court, the BAP, the trial court and the debtor all have agreed that no signed writing waiving the right to reimbursement was ever executed by the appellee. If the property, as a matter of law, did not change character then it was and is separate property.

Property rights are created and defined by state law. The character of the property is the choice of the legislature and the courts function must be to follow and to apply those definitions.

Factors determinative of separate vs. community property characterization generally are the time of the property's acquisition, and whether there has been an effective transmutation from separate to community or vice versa. [Marriage of Haines, supra, 33 Cal. App. 4th at 291].

"The character of property generally is not affected by a mere change in form . . . and property derived from a separate property source remains separate property. Consequently, the resolution of characterization disputes often boils down to ascertaining and characterizing the source of the property in question". [Hicks v. Hicks (1962) 211 Cal. App. 2d 144, 152-153].

Where there is a specific statute that determines the issue it must be followed over a general statute.

The conclusion of state court marital property division proceedings involves the interpretation and application of state law. [In re Robbins, 964 F. 2d 346]. Since the federal court is bound to apply state law and use state court interpretation, a differing result between the courts would allow for forum shopping and gamesmanship between the parties.

The mandatory language of Family Code Section 2640 would be given no meaning and be of no value if it is not followed by the courts. The legislature meant for the property to retain its separate property character.

In writing the statute the legislator had specifically determined that funds contributed would retain their separate property character absent a written waiver that gave up the right to retain the funds as separate property. This court, as well as the trial court and the BAP have specifically found that the appellee did not make such a waiver.

There is no dispute that the funds began as separate property. If they had changed to community the court could not order their reimbursement. It is because the

funds retained their separate property character that the contributing party is entitled to their return.

IMPAIRMENT OF VESTED PROPERTY RIGHT

The legislature's statement of nonretroactivity to proceedings commenced before 1984 responds to the California Supreme Court's decision that Section 2640 cannot constitutionally be applied to cases pending before the statute's 1/1/84 operative date; since doing so would impair vested property rights without due process of law. [Marriage of Fabian (1986) 41 Cal. 3d 440, 448-451].

The mere commingling of *separate* and community *property* does not alter the status of the respective *property* interests provided the components of the commingled mass can be traced to their separate property vs. community property source so as to permit identification of the separate property vs. community property interests. [Hicks v. Hicks (1962) 211 Cal. App. 2d 144, 154].

California Family Section 2640 effectively reverses the Lucas rule. Under Section 2640, a separate property "contribution" to the acquisition of any community property must be reimbursed in the property division proceeding, unless the spouse who made the contribution has waived that right in a signed writing.

There is a right of reimbursement when separate property is used to acquire property presumed to be community property under California Family Section 760 or under California Family Section 2581. [Marriage of Witt (1987) 197 Cal. App. 3d 103, 108].

A separate property contribution to the acquisition of community property before 1984 in effect amounted to an unconditional gift to the community and thus conferred upon the other spouse a vested property right.

A spouse does not acquire any "vested property interest" when the other spouse contributes separate property to community property to hold otherwise would, make Section 2640 applicable only when a trial court divides property, rather than when the property is initially acquired by or transferred to the marital community." This would make nonsense of Section 2640. [Marriage of Witt, supra].

The spouse retains the vested property right of their separate property contribution.

The right to reimbursement is absolute [California Family Section 2640(b)].

The courts have further held that it is clear that the very writing that gives rise to the Section 2581 community property presumption is not a sufficient written waiver of the reimbursement right. "If the same deed [that create the Section 2581 community property presumption] . . . were to operate as a waiver of reimbursement right under section [2640] the net effect would be no change whatsoever in the Lucas [gift presumption] rule." [Marriage of Kahan (1985) 174 Cal. App. 3d 63, 72; Marriage of Anderson (1984) 154 Cal. App. 3d 572, 580; Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202-1203].

California Section 2640 does far more than create a mere "presumption". *Fabian* makes clear that the statute

creates a new property right in the contributing spouse "property right of reimbursement" [Marriage of Fabian, supra; Marriage of Witt, supra; Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202].

A signed writing by the contributing spouse is required to defeat the reimbursement right.

Based on the decision rendered the appellee asserts that a material point of fact and law has been overlooked by this court in the rendering of their decision.

COMMUNITY PROPERTY VS. SEPARATE PROPERTY

The character of property will not be transmuted absent some specific event or affirmative action. Once the property was sold the funds were awaiting only the courts confirmation of those funds. By following Family Code Section 2640 the separate property funds of Dorothy Mantle would be ordered confirmed to her by the court. It is because they were and remain separate property that the court is able to reimburse to her what she had contributed. If she had waived her rights or had done some act to relinquish her right then that act of transmutation would devoid her of the ownership characteristics.

Reviewing the current law in the area[3] the analysis finds:

> "In dividing community property of the parties on marital dissolution, a court is required to

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[3] Matthew Bender, California Family Law, Practice and Procedure, Second Edition, at Ch. 20.12[4][a][ii].

> order reimbursement for separate property contributions to the acquisition of the community property at issue, unless the contributing party has made a written waiver of the reimbursement right of signed a writing that has the effect of a waiver. This reimbursement right arises regardless of whether the court determines that the property is community on the basis of the "joint form-community property" presumption or by applying some other characterization principle."

The legislature determined that *absent a writing that gave up the separate property rights of the contributing party,* the property remained separate. At the time of dissolution of marriage the contributing party was assured that their separate property would be returned. This can be done only if the property retains its separate property character.

The issue presented by the appellee to the trial court, the BAP and this court was whether the Federal Court in rendering it's decision must follow the law of the forum. It is without question that if the facts (stipulated to by the parties) were presented to a California court, the result would be a finding that the separate property monies contributed by Dorothy Mantle to the acquisition of the real property would be awarded to her as separate property.

The trial court and the BAP both acknowledged that the California forum court would so hold.

If we look at the premise that a court needs to decide the interest before it has a legal characterization then the result would be that the property has no characterization

prior to that time and as such is not separate or community property. If the property retains its original character and merely awaiting an order for distribution then it is up to the court to look to the law.

THE COURTS MANDATE IS TO DECIDE THE CHARACTER OF THE PROPERTY

The code uses the mandatory that the party making the *separate property* contribution *shall* be reimbursed those separate property funds contributed. This is in accord with *In re Marriage of Romant* (1993 4th Dist) 21 Cal App 4th 542, where the court held: "In a marital dissolution action, the trial court erred in denying wife's claim for reimbursement of separate property contributions she made to the family residence." The court was emphatic that: *a court is* ***required*** *to order reimbursement* for separate property contributions. Using the definition as set forth in Family Code Section 770(a)(1): "All property owned by the person before marriage;" is by law separate property. (Cal. Constitution, Art. I section 21, *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal. App. 4th 1798, 1803. There is no disagreement that the funds used to make the downpayment on the real property was the separate property of Dorothy Mantle. There is no disagreement that no transmutation of those funds occurred. Family Code Section 2640 mandates that the separate property contributed to the acquisition of real property must be reimbursed to the spouse contributing such separate property funds.

Prior to the enactment of 2640, a gift presumption attached where one spouse used separate property funds

during marriage for a community purpose, absent a writing that the property was to retain its separate property character. [Marriage of Lucas (1980) 27 Cal. 3d 808]. This gift presumption is now eliminated.

Family Code Section 752 states:

"Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other."

Family Code Section 770 provides as follows:

"(a) Separate property of a married person includes all the following:

(1) All property owned by the person before marriage."

IMPAIRMENT OF RIGHTS

A community property division or transmutation into respective separate property estates cannot be effected simply by filing a petition in *bankruptcy* or scheduling community property in the bankrupt's estate. Only a family law court judgment may divest the nonbankrupt spouse of his or her community interests. [Marriage of Seligman, 14 Cal. App. 4th 308].

It is appellee's position that the courts order which divides the property is not the critical factor. The decision of the Superior Court does not change the character of the property. The decision of the court acts to award community and to confirm separate property to the owner spouse. The property does not change form upon the order being made. Instead the court merely enunciates and follows the law of California to declare the character

then existing. Separate property held in a separate bank account is not property without a characterization prior to pronouncement by the court. Neither is the separate property of Dorothy Mantle community property that changes its character at the time the court enters it order.

If the character of the property is separate then it cannot be part of the bankruptcy estate. Where appellee respectfully disagrees with this courts opinion is in the interpretation of the California statute. California Family Code Section 760 provides: "***Except as otherwise provided by statute*** . . . ". This is a general statute that must give way to a specific statute that controls. Family Code Section 2640 is a specific statute that must take precedent. At page 10337 of the opinion, the court states that "Where the disagreement arises is with respect to the characterization of the proceeds received from the sale of the property. John claims the proceeds retained their community property nature." Dorothy asserts that these funds cannot "retain" their community property nature as they never were community property to begin with. The contributed funds were separate property. They retained that character ***absent a signed writing*** that gave up that characterization. As the court noted in referring to the *Hicks*[4] case "property that is separate at the time of marriage retains its separate character throughout the marriage, even if it is transmuted from one form to another."

Marital property division proceedings fall within the category of cases in which state courts possess "special

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[4] Hicks v. Hicks (1962) 211 Cal. App. 144, 151

expertise and for which federal courts owe significant deference." [In re Robbins, 964 F. 2d 342, 345-346].

"It is appropriate for *bankruptcy* courts to avoid incursions into family law matters (including marital property distribution) out of consideration of court economy, judicial restraints, and deference to our state court brethren and their established expertise in such matters." [In re McDonald, 755 F. 2d 717].

Where the bankruptcy court does decide to make a determination of the issues they are obligated to follow the law of the forum and decide the matter in the same way a family law judge would apply the law. The decision must be consistent between federal and state court judges. If decided in a state court, all family law judges would find the property to be separate property and would order it confirmed to Dorothy Mantle.

CONCLUSION

Based on the stipulated facts as applied to California law and on the Walrath case, decided after this matter had been submitted, together with the arguments and cases set forth above the petitioner respectfully requests that the court set a time for rehearing on this matter. Such rehearing would allow the appellee to be accorded consideration of the new case and consideration of the taking of a vested property right, as recognized by the BAP, in their decision. The result of this decision would overturn the purpose of the legislative enactment of 2640 and return the status of property to the *Lucas* rule that was specifically overturned by the legislature. This ruling if allowed to stand would reverse 15 years of law and make

the rights of property ownership different if decided in state court or federal court. Property rights should not be subject to differing interpretations depending on whether decided by a state court or a federal court.

Respectfully submitted, McMillan & Tkach, LLP

Dated: September 17, 1998 By: /s/ John A. Tkach
John A. Tkach

APPENDIX E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JOHN R. MANTLE, Debtor	)	No. 96-55833
	)	BAP No. CC-95-011868-VMeO
	)	LA94-04264-BR
JAMES A. DUMAS, JR., Chapter 7 Trustee, Appellant, vs. DOROTHY M. MANTLE, Appellee.	)	ORDER
	)	(Filed Oct. 1, 1998)

Before: BROWNING, BRUNETTI, and FERNANDEZ.

Appellee's petition for rehearing is DENIED.

APPENDIX F

DUMAS & ASSOCIATES
Richard Malatt, Esq. (SBN 73405)
445 South Figueroa Street
Suite 2400
Los Angeles, California 90071
(213) 895-4500

Attorneys for Chapter 7 Trustee,
James A. Dumas, Jr.

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re JOHN MANTLE, Debtor.	Bk. No. LA93-33940-BR Chapter 7
JAMES A. DUMAS, JR., Chapter 7 Trustee, Plaintiff, v. DOROTHY M. MANTLE, AND ALLEN ERDY ESCROW COMPANY, a California corporation, Defendants.	Adv. No. LA 94-04264 BR [PROPOSED] JOINT PRE-TRIAL ORDER Date: April 18, 1995 Time: 2:00 p.m. Place: Ctrm. "1668"

Plaintiffs James A. Dumas, Jr., the Chapter 7 Trustee for the estate of John Mantle, and defendant Dorothy M.

Mantle, submit the following Joint Pre-Trial Order, in accordance with Local Bankruptcy Rule 121:

A. The following facts are admitted and require no proof:

1. Prior to August, 1985, defendant Dorothy M. Mantle, then called Dorothy M. Simonelli ("defendant"), was the owner of certain real property located at 1102 MacNeil Street, San Fernando, California 91340. This property was sold in August, 1985 at which time defendant received $79,373.76 in funds. These funds were placed into a checking account in the Trans World Bank, San Fernando, California, account no. 065-651-13411188.

2. Prior to defendant's marriage to the debtor John Mantle (the "debtor") in June of 1985, John Mantle and defendant jointly made application to secure a loan for purchase of certain real property, later used by the debtor and defendant as their principal place of residence, located at 24033 Ingomar Street, Canoga Park, California (the "Ingomar Property"). At that time they submitted a joint application for the loan, the parties designated the manner in which title to be held as "an unmarried woman and an unmarried man, as joint tenants."

3. Prior to the closing of the purchase of the Ingomar property, the parties were married. On September 13, 1985, a Corporation Grant Deed transferring the Ingomar Property to the debtor and defendant Mantle was recorded in the official records of Los Angeles County Recorder's Office as Instrument No. 85-1063510. Title to the Ingomar Property was taken as follows: John Mantle and Dorothy M. Mantle, husband and wife as joint tenants.

4. The purchase price for the property of $238,900 consisted of $62,306 in defendant's separate property funds for a down payment transferred from the defendant's Trans World Bank account by cashier's check to Safeco Title dated September 6, 1985, together with the execution of a Promissory Note in the amount of $175,000 signed by the debtor and the defendant jointly and severally, secured by a first deed of trust, also executed by the debtor and defendant.

5. From the time of the marriage in June, 1985, through the date of separation in June, 1990, the parties made payments on the Promissory Note to their first mortgage lender, from community property funds derived from the parties' earnings. During the course of the marriage, the parties made certain improvements to the Ingomar Property with community property funds.

6. In the course of discovery in the dissolution proceeding, the defendant has alleged a number of oral agreements made between the debtor and defendant respecting the characterization or disposition of the Ingomar Property. The defendant has responded in pertinent part to a Form Interrogatory, as shown below:

> *Interrogatory 2.* Agreements. Are there any agreements between you and your spouse made before or during your marriage or after your separation that affect the disposition of assets, debts, or support in this proceeding? If your answer is yes, for each agreement, state the date made and whether it was written or oral, and attach a copy of the agreement or describe its content."

Defendant's response to Interrogatory 2 (in pertinent part):

(f) $24,000 which John obtained from refinance of Glendale house would be used to improve community house (gift to the community). Oral agreement July, 1986.

7. In the original Petition for Dissolution of Marriage filed October 10, 1990, by John Mantle, the following was included on the form as item 4:

"Petitioner requests confirmation as separate assets and obligations the items listed below:

ITEM	CONFIRMED TO
Separate funds used for improvements on community residence.	Petitioner
Inheritance received during marriage	Petitioner
Separate downpayment on community residence	Respondent
401(k) Pension/Retirement Benefits with respective employers	Pet. & Resp.
Whole Life Insurance Policy	Petitioner"

8. There were no written agreements between debtor and the defendant altering, modifying or changing the manner in which title to the Ingomar property is held. Nor were there any written agreements waiving any right to reimbursement that might be available pursuant to Family Code Section 2640.

9. In September of 1985, the defendant paid $3,824 of her separate property funds to install a burglar alarm on the Ingomar property, and an additional $3,000 was

paid into escrow from separate property to cover cost of closing.

10. In December, 1991, the Ingomar Property was sold and the balance of all proceeds after payment of indebtedness and costs of sale, in the amount of $67,295.12 was placed in an escrow account pending further order of the Superior Court. These funds have been earning interest and defendant Allen Erdy Escrow now holds all funds in its account, pending further order of the Court.

B. The following issues of fact, and no others, remain to be litigated.

None.

C. The following issues of law, and no others, remain to be litigated.

1. Is 11 U.S.C. §541(a)(2), making all community property of spouses part of the bankruptcy estate, subject and subordinate to a non-debtor spouse's rights to reimbursement for separate property contributions to a community residence, by virtue of Cal. Fam. Code §2640?

2. Is the Chapter 7 Trustee entitled to invoke on his behalf the presumption set forth in Cal. Fam. Code §2581, to allow him to claim that property acquired in joint form during marriage is presumed to be community property?

3. Does a non-debtor spouse's right to reimbursement for separate property contributions to a community estate constitute a mere claim in the bankruptcy, or, alternatively, an interest in separate property to be excluded from the estate, prior to payment of creditor claims?

4. Does the Trustee have a right to seek a turnover order of the separate property of the non-debtor spouse?

5. Does California law control how the court is to decide the separate property v. community property interests of the parties?

6. Does the debtor/Trustee have any right to include as part of the bankruptcy estate the separate property of the non-debtor spouse?

7. Does California Family Code Sec. 2640 make mandatory upon the court to order reimbursement to the contributing spouse their separate property contributions to the acquisition of property during marriage?

D. Attached are the list of exhibits intended to be offered at the trial by each party other than the exhibits to be used for impeachment only. The parties have exchanged copies of all exhibits.

None.

E. The parties have exchanged list of witnesses to be called at trial.

No witnesses to be called.

F. Other matters that might affect the trial.

The parties have stipulated to allow the Court to decide the case based upon the facts set forth in the Proposed Pretrial Order. The parties wish to submit briefs or legal argument to assist the Court. Should the Court desire oral argument, the parties are amenable, at the time and date as set by the court. Should the court wish to decide the matter based on the facts, stipulations and

briefs of counsel, the parties are prepared to waive oral argument.

The parties would request that the court allow briefs to be filed and exchanged at the time of the Pre-trial Conference.

G. All discovery desired to be conducted has been completed.

H. The parties are ready for trial, by the Court, based upon the facts in the Proposed order.

I. There is no estimated length of trial.

J. The forgoing admissions have been made by the parties, and the parties have specified the remaining issues of fact and law remaining to be litigated. Therefore, this order shall supersede the pleadings and govern the course of trial of this cause, unless modified to prevent manifest of justice.

DUMAS & ASSOCIATES

Dated: April 4, 1995 By: /s/ Richard Malatt
Richard Malatt
Attorneys for Plaintiff
Chapter 7 Trustee
James A. Dumas, Jr.

Dated: April 4, 1995 MCMILLAN & TKACH

By: /s/ John A. Tkach
John A. Tkach
Attorneys for Defendant
Dorothy M. Mantle

Order

IT IS SO ORDERED.

Dated: 4/19/95

BARRY RUSSELL
The Honorable Barry Russell
United States Bankruptcy Judge

APPENDIX G

JOHN A. TKACH, Esq. [SBN 93025]
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Attorneys for Defendant
DOROTHY M. MANTLE

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re:

JOHN MANTLE, Debtor.	BK. NO. LA 93-33940-BR Chapter 7
JAMES A. DUMAS, JR., Chapter 7 Trustee, Plaintiff, v. DOROTHY M. MANTLE, AND ALLEN ERDY ESCROW COMPANY, a California Corporation, Defendants.	Adv. NO. LA 94-04264 BR **TRIAL BRIEF OF DOROTHY MANTLE** **PRE TRIAL:** Date: April 18, 1995 Time: 2:00 p.m. Place: Courtroom "1668"

Defendant DOROTHY M. MANTLE, through her attorney of record, John A. Tkach of McMillan & Tkach presents and submits this Trial Brief.

I

FACTS & BACKGROUND

The parties, John Mantle (debtor) and Defendant, Dorothy M. Mantle were married on June 8, 1985 and separated on September 19, 1990. Prior to marriage they began looking for a house to purchase. Certain financial documents and applications were submitted to the lender. An escrow was opened prior to their marriage on or about April 2, 1985. Dorothy Simonelli (now Mantle) provided, from her separate property funds, a check for $3,500 to be deposited to open escrow, along with certain other documentation. At the time the escrow was opened, title was to be taken by the parties as unmarried persons in joint tenancy.

Title to the real property, located at 24033 Ingornar Street, Canoga Park, was taken by Grant Deed and conveyed to the parties as follows: "John Mantle and Dorothy M. Mantle husband and wife as Joint Tenants".

Title to the property remained in Joint Tenancy at all times.

The property was later sold and escrow closed on December 13, 1991. The proceeds from the sale, after taxes, liens, encumbrances and costs of sale were paid, was $67,295.12. This sum has been held at Allen Erdy Escrow since that time.[1]

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[1] The escrow company deposited the principal amount into an interest bearing account pending direction as to disposition of the funds.

On October 10, 1990 John Mantle filed a petition for Dissolution of Marriage in the Los Angeles Superior Court, Case No. LD 001 297 Northwest Branch Court.

On December 16, 1991 a check of $67,295.12 was deposited into an interest bearing escrow account.

On July 6, 1993 the debtor, John Mantle filed his Bankruptcy Petition Case No. LA93-33940-BR.

II

ISSUES TO BE ADDRESSED

The court must decide certain issues. They are:

a) Whether the separate property right to reimbursement statute, as set forth in Family Code § 2640, requires the court to order the separate property of Dorothy Mantle be paid out of the proceeds from the sale of the property.

b) Whether the separate property of Dorothy Mantle can be included in the Bankruptcy estate of John Mantle.

c) Whether the Trustee can seek to impose a turnover order of the separate property of the non-debtor spouse.

d) Whether California law allows for the separate property reimbursement to be paid prior to the distribution of joint tenancy or community property interests, if any, are found to exist.

e) Whether the Trustee has provided sufficient evidence to allow the court to change the joint tenancy title to community property.

f) Whether the non-debtor's right to reimbursement of separate property excludes those funds from being made part of the bankruptcy estate.

III

SEPARATE PROPERTY AND DOROTHY MANTLE'S RIGHT TO REIMBURSEMENT

Separate Property is defined as: "All property owned by the person before marriage";[2] or

"All property acquired by the person after marriage by gift, bequest, devise, or descent[3] The rents, issues, and profits of the property described in . . . section (770 et seq.)"[4] In Family Code section 752, it states: "Except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other."

The separate property of a party will retain that character, even if the common law presumption arising by title shows the property is held in joint tenancy. The common law presumption is rebuttable and the more specific separate property interests have superior rights.

The Court, in deciding the issues of ownership and rights to the property are required to follow the law of California, and to apply the same principles that would be applied if decided by a State Court Judge.

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[2] Family Code 770 (a) (1)

[3] Family Code 770 (a) (2)

[4] Family Code 770 (a) (3)

The question before this court is, what interest, if any, does the bankruptcy Trustee, successor to John Mantle have in the proceeds of the sale of the residence.

In order to determine that interest the court must view the structure of the California Family Code and how it is to be applied. In California there can be separate property, community property, joint tenancy property, or tenancy in common property holdings. The fact situation of this case revolves around the separate property, and joint tenancy interests.

The interest of each spouse in joint tenancy property is that of an undivided one-half separate property interest.[5] Upon death of one of the joint tenants the property transfers outside of probate to become the sole property of the remaining joint tenant.

As certain cases have pointed out, joint tenancy, unlike a levy on community property, subjects to execution only the interest of the spouse whose separate property is liable for payment of the debt involved.[6]

Joint tenancy title raises a presumption that each spouse has a one-half interest in separate property.

In response to the 1980 case of *Lucas*,[7] CC 4800.2 was enacted by the legislature in 1983. It held that all separate

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[5] *Fly v. Bihr* (1970) 6 CA 3d 248
Kauge v. Kaupe (1955) 131 CA 2d 511
In Re Marriage of Hilke (1992) 4 C 4th 215

[6] *Kane v. Huntley Financial* (1983) 146 CA 3d 1092

[7] *In re Marriage of Lucas* (1980) 27 C3d 808.

property contributed to acquire property retained its separate property character unless there was a writing by which the separate property right to reimbursement was expressly waived. (Later amended in 1986).

Former Civ. Code § 4800.2 provided for reimbursement of separate property contributions [now Family Code § 2640].

> In the case of *In re Marriage of Romant* (1993 4th Dist) 21 Cal App 4th 542, reh gr (Cal App 4th Dist), The court held: "In a marital dissolution action, the trial court erred in denying wife's claim for reimbursement of separate property contributions she made to the family residence (Former Civ. Code, § 4800.2) [now under Family Code § 2640.]
>
> The court went on to say:
>
> ". . . . The wife was entitled to reimbursement for her separate property contributions to the extent she could trace them to a separate property source. . . . "
>
> "In dividing the community property of the parties on dissolution, *a court is required to order reimbursement* for separate property contributions to the acquisition of the community property at issue, unless the contributing party has made a written waiver of the reimbursement right or signed a writing that has the effect of a waiver"[8] (CA Family Law Practice and Procedure 2d Ed. § 20.12 [4] [a] [ii]) (emphasis original).

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[8] Family Code § 2640

This section then explains how reimbursement occurs when the property is held in joint tenancy or with community property title designations. The section states:

> "This reimbursement right arises regardless of whether the court determines that the property is community on the basis of the "joint form community property" presumption, or by applying some other characterization principle. In other word, it applies to a community property on division."

This case sets forth clearly the priority of distribution of monies from the sale of property.

From the net proceeds of sale,[9] the separate property will first be reimbursed in accord with Family Code § 2640.[10] All funds remaining, after the separate property has been reimbursed are then to be divided between the parties.

> Family Code § 2640 states, in relevant part: "(a) Contribution to the acquisition of the property. . . . include downpayment, payments for improvements. . . . (b) In the division of the community estate. . . . the party *shall* be reimbursed for the party's contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source. The amount reimbursed shall be without interest or adjustment for change in monetary values and shall not exceed the net value of the

---

[9] After payment of the mortgage, real estate taxes, liens, real estate commissions and other legal encumbrances.

[10] Which allows reimbursement without right to appreciation or interest.

property at the time of division" (emphasis added).

The California Family Law Practice and Procedure, 2d Ed, sets forth at section 20.51 that:

"unless a party has made a written waiver of the right to reimbursement. . . . the party must be reimbursed for his or her contributions to the acquisition of the property."

It is stipulated by the parties that no such waiver exists or even existed.

It is stipulated that separate property funds were contributed to the acquisition of the property.

It is stipulated that in the Petition for Dissolution of Marriage filed by the debtor John Mantle that he requested the court to confirm to Dorothy Mantle her separate property interest in the real property.

It is stipulated that the amount she can trace is $69,130.00.[11]

Therefore, under California law, the total amount of the funds being held in escrow are the separate property of Dorothy Mantle, and are to be confirmed to her.

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[11] Joint Pre-Trial orders and stipulation of facts, Page 2, Paragraph 4, and Page 4, Paragraph 9.

IV

JOINT TENANCY TITLE v. COMMUNITY PROPERTY PRESUMPTION

In the case of *Gorman v. Cochrane* 159 B.R. 543 (9th Cir BAP 1993), a nondebtor spouse moved the court for an order directing the trustee to release and distribute to her one-half of the proceeds from the sale of the Family residence. On appeal it was determined that the property was held in joint tenancy and not as community property, so that only one-half of the sales proceeds could be included as property of the debtor.

The Court stated:

> "Appellant moved the court for an order directing the Trustee to release and distribute one-half of the sales proceeds to her as a joint tenancy pursuant to § 363 (j)m

FN. 3, in that case states:

> "Section 363(j) provides in relevant part: After a sale of property. . . . The Trustee shall distribute to the debtor's spouse or the co-owners of such property. . . . the proceeds of such sale, less the costs and expenses. . . . of such sale, according to the interest of such spouse. . . . 363(i)."

In the *Gorman* case the court further found that:

> "Nevada is a community property state. Property acquired after marriage is presumed to be community property."

California is also a community property state, with a similar presumption. As, in Nevada, California law allows for the parties to hold title to property as joint tenants. Further, as in Nevada, California holds that

recorded deeds serve notice to subsequent purchasers and mortgagees.

In *Gorman* the deed to the property was held in joint tenancy. The same situation applies in this case. In fact, it has been stipulated that the deed is one where the parties continuously held the property in joint tenancy form, from the time of acquisition until the date when the property was sold. The court in *Gorman* stated,

> "The fact the property was purchased with community funds, standing alone, is insufficient to rebut the presumption created by the form of the deed."

As such, the court held the non-debtor must receive one-half of the proceeds as the property was held in joint tenancy. This was because each party possessed a one-half separate property interest.

Further, in the case of *Gorman* case, the court held that title to the property, held in joint tenancy, and without any showing it was done for any fraudulent or unlawful reason caused the character of the property to be separate property, whereby each party was entitled to one-half of that separate property.

The issue that was not raised in that case, and which is now before this court is this: **What is the contributing party's right to reimbursement of separate property funds used to acquire property, held in joint tenancy.**

As to this issue the law in California is clear. The party who uses separate property funds for the

acquisition of property[12] must be reimbursed the amount contributed.

In subsection (b) of Family Code § 2640, the legislature uses the mandatory language *shall*, in setting forth the right to reimbursement. It states, in pertinent part that:

> "unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party *shall* be reimbursed for the party's contributions to the acquisition of the property to the extent this party traces the contributions to a separate property source."

The parties have stipulated there is no written waiver of the right to reimbursement by Dorothy Mantle. The parties have stipulated that Dorothy Mantle can trace those sums agreed to be her separate property contributions to the purchase of the residence.

The parties have stipulated to the dollar amount of the separate property contributions by Dorothy Mantle, as being $69,130.00.

The Order of distribution of funds from the sale of real property would be as follows:

a) All mortgages, liens and encumbrances owing on the property;

b) All taxes and assessments;

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[12] "Contributions to the acquisition" as defined in Family Code § 2640 include all *down payments*, payments for *improvements*, and payments that reduce the principal of a loan. (emphasis original).

c) All costs of sale, including escrow fees;

d) Separate property reimbursements;

e) Division of the joint tenancy or community property interest, with one-half being paid to each party.[13]

In fact, this is the only method by which this right of reimbursement can work. Once all liens and costs of sale are paid the only interests remaining in the property are the separate property and the joint tenancy interests. If the separate property contributions. were not paid first, it would create a situation whereby there would never be a fund from which a party would be re-paid their separate property contribution.

If the joint tenancy property were equally divided between the parties first then how and from what fund would the reimbursement be paid? Would the noncontributing spouse have to repay the whole of the other party's contribution out of funds received?

Because of the California economy declining and the parties having acquired a second mortgage during the marriage, all of the equity in the community estate had been depleted. All that is left to be distributed is the separate property contributed by Dorothy Mantle.

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[13] Although the Family Law Court will determine the division as being onehalf of the community property interest to each party, the Court can in certain situation off-set payments to allow off-setting assets or transfers to equalize division from other assets that may be awarded.

V

ALL OF THE FUNDS HELD IN ESCROW ARE THE SEPARATE PROPERTY OF DOROTHY MANTLE

Because the reimbursement amount is in the sum of $69,130.00 and the net proceeds paid to escrow was $67,295.12 all of the monies now held in escrow, a total of $74,295.93 should be Ordered paid to Dorothy Mantle.[14]

Because the funds belong to Dorothy Mantle, the entire amount, plus all accrued interest thereon should be ordered paid forthwith to Dorothy Mantle.

There is no community interest in the property which can be obtained by the Trustee.

The contribution of separate property funds to the acquisition of the real property does not alter the character of the funds. They remain separate property. Family Code § 752 states, in pertinent party:

> "neither husband nor wife has any interest in the separate property of the other."

Family Code § 777 States:

> "(a) separate property of a married person includes the following: (1) All property owned by the person before marriage."

It is undisputed, and stipulated by the parties, that $69,130.00 is Dorothy Mantle's separate property. It is stipulated that no writings exist or ever existed that

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[14] The difference in the amount deposited into escrow and the amount now being held consists solely of interest earned on the $67,295.12 deposited and held in escrow since the date of sale of the property on December 13, 1991.

waives her right to reimbursement of her separate property funds. Those funds have never changed character. They were and are the separate property of Dorothy Mantle. They are hers and hers alone, which she in effect, loaned to the marital union without interest or appreciation. As a matter of law, that money retained its separate property character, absent a written agreement that would transmute it to some other form.

VI

COMMUNITY PROPERTY vs. JOINT TENANCY PROPERTY

Family Code § 750 sets forth that:

> "A husband and wife may hold property as joint tenancy or tenancy in common, or community property."

The more generalized statute at Family Code § 760 sets forth that, "Except as otherwise provided. . . . all property. . . . is community property." The Law Revision Comment – 1993, 3d paragraph states, in part:

> "The major exception to the basic community property rules are those relating to separate property."

However, the court need not even reach the issue of Whether the presumption of joint tenancy being characterized as separate property or community property, since the interest of Dorothy Mantle is separate property and has never changed its character.

VII

HISTORY OF REIMBURSEMENT STATUTE

Family Code § 2640 continues former C.C. Section 4800.2. That statute was enacted in 1983 specifically to reverse a rule handed down in the case of Lucas[15] and those cases following. The *Lucas* line of cases precluded recognition of the separate property contributions of a party to the purchase of property, unless the party could show an agreement between the spouse evidencing that the contribution was not intended to be a gift.[16]

In the *Lucas* case, the court held that a party who used their separate property funds was entitled to reimbursement from the community or separate property of the other spouse only if there was an agreement between the parties to that effect. The court ruled that absent such an agreement, it would be deemed a gift.

Family Code § 2640[17] was enacted by the legislature specifically to overturn the *Lucas* case. It provided that absent a "written waiver" the party contributing the separate property "shall be reimbursed" their separate property funds.

> "In cases to which 2460 applies, the right to reimbursement is absolute" unless a party has

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[15] *In re the Marriage of Lucas* 27 C 3d 808 (1980)

[16] Additional background on C.C. § 4800.2: *Recommendation Relating to Division of Joint Tenancy and Tenants in Common Property at Dissolution of Marriage*. 16 Cal L. Rev. Comm'n Reports 2165 (1982); 17 Cal L. Comm'n Reports 863 (1984) 18 Cal L. Revision Comm'n Reports (1986): 18 Cal L. Revision Comm'n Reports 1741 (1986).

[17] Former section C.C. § 4800.2

made a written waiver of the right to reimbursement. . . . " (F.C. § 2640][18]

"More than a "presumption": Family Code § 2640 does far more, than create a mere "presumption" (under such a theory, absent of a written waiver would only establish a presumption that the separate property contributions did not make a gift to the community, rebuttable by proof of the contributions donative intern). *Fabian* makes clear that the statute creates a new property right in the contributing spouse – i.e., a "property right of reimbursement" *(Marriage of Fabian,* 41 C 3d at 444, [other cites omitted]"[19]

The purchase of the property in late 1985 was almost three years after the legislature had enacted C.C. 4800.2 (now Family Code § 2640). In 1990, when debtor John Mantle filed his Petition for Dissolution, he was fully aware of this and specifically requested that the court confirm to Dorothy Mantle, as her separate asset the separate property used for the downpayment of the residence. This acknowledgement in the petition of Ms. Mantle's absolute right to reimbursement, together with the stipulation offered in this matter, that acknowledges the amount and stipulates as to the tracing of funds, makes it clear that the court in following California law, should order that the funds held in escrow by Allen Erdy Escrow (together with the interest accumulated on that separate property from 1991 when the property was sold) be forthwith turned over to Dorothy Mantle.

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[18] Ca Practice Guide, Family Law (1994) Hogoboom and King, The Rutter Group Section 8:442 and 8:443

[19] i.d.

VIII

THE TRUSTEE'S RIGHTS ARE LIMITED TO THOSE OF THE DEBTOR'S RIGHTS

Can the Trustee obtain more rights and property than the debtor would be entitled to upon dissolution?

The Trustee cannot, by stepping into the debtor's shoes, obtain greater rights and enlarge the "property of the estate", as set forth in § 541. In fact the property of the debtor is determined by State law.[20] As has been set forth herein there is no right by the debtor/trustee to the separate property of Dorothy Mantle.

The Trustee is only entitled to the property of the debtor. The Trustee stands in the shoes of the debtor and cannot obtain relief or rights to property in excess of those that the debtor would have himself.

As such, the Trustee can only obtain monies that would rightfully be the debtor's. Here, the sale of the property has been completed. The distribution of those proceeds can be determined based on California law. As has been set forth above, the first distribution of net proceeds,[21] goes to reimburse the spouse who has made a separate property contribution to the acquisition of the property. Next, the joint tenancy interests would be divided one-half to each. Because the parties took out a second mortgage during the marriage and the general market declined in value of real property there is nothing but the separate property interest of Dorothy M. Mantle.

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[20] *In re Farmers Markets, Inc.* (9th Cir 1986) 792 F 2d 1400.

[21] After all encumbrances and costs of sale.

Had there been funds in excess of the separate property contributions, then each party would be entitled to one-half that amount and the Trustee as successor to the of the rights of the debtor, the Trustee would have been entitled to John Mantle's one-half interest.

CONCLUSION

Based on the facts, as set forth herein, the stipulation of the parties, and the law applicable to the issues before this court, defendant, Dorothy M. Mantle would pray the court to make the findings that the separate property contributions total $69,130.00; that the principal proceeds from the sale (together with the accumulated interest) be awarded to Dorothy M. Mantle; that the escrow company be directed to distribute the funds to Dorothy M. Mantle; that the turn-over order requested by the Trustee be denied; and for such other relief as this court may deem just and proper.

Respectfully Submitted,

McMILLAN & TKACH

/s/ John A. Tkach
JOHN A. TKACH,
Attorneys for
Defendant, Dorothy M. Mantle

APPENDIX H

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In Re:	Case No. LA93-33940-BR
JOHN MANTLE,	
Debtor.	Los Angeles, California Wednesday, June 28, 1995 2:00 p.m.
	Adv. No. LA94-04264-BR
	HRG. RE COMPLAINT FOR: (1) TURNOVER OF PROPERTY OF ESTATE; (2) DECLARATORY RELIEF (11 U.S.C. SECTION 541(a)(2) AND 42)
	*SET FR. 4-18-95
	JAMES A. DUMAS, JR., CH. 7 TRUSTEE VS. DOROTHY M. MANTLE, AND ALLEN ERDY ESCROW COMPANY

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BARRY RUSSELL
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Trustee: RICHARD MALATT, ESQ.
Dumas and Associates
Union Bank Square
445 South Figueroa Street
Twenty-fourth Floor
Los Angeles, California 90071
(213) 895-4510

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

[p. 13] MR. TKACH: – is because –

THE COURT: Well, the bankruptcy was filed before the court order.

MR. TKACH: Before the court order –

THE COURT: Distributing the funds.

MR. TKACH: – making the determination, yes. There has not been the trial in the state court.

THE COURT: So you don't – You can't even say absolutely it's subject to proof, of course, of whether or not it's her property or not. So it doesn't happen automatically as a matter of law, does it? Don't you need a court order?

MR. TKACH: We – We have stipulated that – Or we have come before this Court to have that determination made, and we have stipulated to every fact that would need to be found –

THE COURT: Well, that's true.

MR. TKACH: – for it to be separate property. So, if this Court then applies California law to that property – which is what we are asking you to do, your Honor. We're asking you to take the California law and apply it to that piece of property. And that law clearly says that those funds locked up in that escrow account are the separate property funds of Mrs. Mantle.

THE COURT: Well, I don't – I don't see that in [p. 14] any statute. What I see is a statute that says that the – that those – she has a right of reimbursement from that fund to the amount that she put in.

MR. TKACH: That's right.

THE COURT: Is there any state statute that says that she owns the funds as opposed to a right of reimbursement from the funds?

MR. TKACH: I think it is extremely clear, your Honor, and let me – let me tell you why, if – if I may.

THE COURT: Is there a statute that says that?

MR. TKACH: Yes.

THE COURT: Which one?

MR. TKACH: 2640, the reimbursement statute, clearly states that – The words within that statute, Section B, say that it shall be reimbursed. This is – This is a mandate by the courts as to what they must do, providing that certain contingencies, which we have stipulated to, both sides have stipulated to, have been found. Okay. So the Court must return those funds to her. The Court has

no option. The Court can't say, "Well, there's other creditors out there. There's other people out there. It's unequitable because there's no other property for the other person."

THE COURT: Especially a priority distribution in the state system.

[p. 15] MR. TKACH: That's right, an absolute priority. What happens under the California law, in effect, is that it never leaves its status of being separate property. The separate property that is taken from the prior sale of the house goes into this property, and – unless there is a written waiver. And they did that specifically because there were a lot of problems in the state court, as you probably are aware, where people would come up and say, "Yeah, well, they said it was mine."

THE COURT: Well, I understand that.

MR. TKACH: Okay. And so they specifically wrote into the statute that it had to be a written waiver. There is clearly no written waiver ever having been written, so that property has always remained in its separate property state. Now, it only comes into play specifically during these time periods when there is a dissolution. And what they have done is they have said, "First priority lien, it comes out." It comes out first. That's the only way it can be done. It can't be done any other way. You can't divide the equity and then take it out. You have to take out the money that went in first, sort of a Fyco-type argument. It comes out first, and then, if there's any money left, that's the community property. That is what anybody could attach, is if there's anything left, but there

is not anything left in this particular case, and that's why nobody can touch

* * *

[p. 20] action.

MR. TKACH: Absolutely.

THE COURT: Or dissolution, or whatever the term is.

MR. TKACH: That is the determination of what the property is. We are asking you to say, "What is this property?" And we're saying that California law prevails as to how the determination is made. And once you have made that determination, then you decide where it goes. You can't start from "Okay. It's going to be this. Now let's figure out what it was." The property determination is the first thing that this Court has to do. And the only thing, if the Court follows California law, in my belief, your Honor, is to say, "Okay. All of the steps were followed. This is separate property."

Now, once that Court makes the determination, then the Court goes on to the next issue: Who gets this property? It's now separate property. Can the trustee get separate property? If she had taken this money and, instead of putting in the house, put it in a bank account, there is no way on earth that the trustee could come in here and say, "Her husband filed bankruptcy. She has separate property funds. We'd like it." There's no way that that would happen.

THE COURT: That's correct.

[p. 21] MR. TKACH: And it's the same thing here, your Honor. You need to say, "What is this?" It's the same thing. We are here before you as if you were the state court judge. No offense.

THE COURT: I don't take any offense.

MR. TKACH: Thank you.

THE COURT: As the expression goes, some of my best friends are state court judges.

MR. TKACH: Terrific. If – If you were the state court judge sitting and hearing this, what is the decision on what this property is?

THE COURT: Well, that's – That's the question that –

MR. TKACH: That's the question. And we believe –

THE COURT: No, it's the question where we may differ.

MR. TKACH: Well –

THE COURT: If that were the question, clearly, clearly, you're correct.

MR. TKACH: Then I think that that is the way that the Court needs to view it, is, what is the property, first, and then, once the determination has been made as to is this – what is this property, and then the determination it is clearly separate property, then the only question is, who

* * *

[p. 23] as I understand it.

MR. MALATT: Or that – Well, I think he confuses a right to reimbursement with some characterization of the nature of property. And I think, since the property was acquired during marriage, the California presumption is that it's community property, and once you have that, it becomes property of the bankruptcy estate, and will be distributed according to the bankruptcy rules.

THE COURT: Well, I agree with the trustee. I think this is one that's probably going to be an appeal, I assume, and some higher court can tell me. But the way I view it, in a nutshell – And I really do – Certainly the – You are sort of passing in the night. One of you is right and one of you is wrong. But the way I view it – And this is strictly – I have, certainly, sympathy, to say the least, for – for your side.

The problem is that you – this is not – this is not a battle between the spouses. If that were the case, hands down, you win. But this is not. That's – That's – That's the problem, from the bankruptcy context. This is a battle between a representative of the estate of the Debtor and the spouse, totally different ball game. So, had it been as you said, if I had been just sitting as a state court judge, hearing this in a dissolution action, of course you win. The statute is – is very simple.

[p. 24] The problem is you have bankruptcy law that intercedes. And what happens is I don't buy, basically, the argument that – that – that, automatically, the house – which, it's clear from the record, was community property, even though subject to, in the state law, if there is a dissolution, a right of reimbursement – but the house is –

start off with that is community property. Then the question is: At what point does it not become community property? It's not sort of limbo, you see. It's something. It starts out at community property, and the only time, the way I view law, is that it becomes not community property is when the Court orders it to be the reimbursement.

So had, for instance, physically, the order been made in state court that – that it's now your client's money, that would have been it, because then it would, at that moment, become separate property. It no longer would be community property. 541(A)(2) would not take place, as in cases where you have a court – this happens a lot – prior to the bankruptcy, has made an order of splitting community property. At that point, then half to the other spouse. It's no longer community property. It's – Now it's a separate property. But it really matters, the way I view the law, at what point we are, that, clearly, had the state court ruled prior to the bankruptcy, then it would have been. But until that order is made that this is the –

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